

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
TENNESSEE WILDLIFE)	
RESOURCES AGENCY (TWRA))	
)	
)	
)	
RESPONDENT)	CASE NO. WPC07-0259

CONSENT ORDER

This Consent Order is made and entered into by and between the Tennessee Department of Environment and Conservation (hereinafter "TDEC") and the Tennessee Wildlife Resources Agency (hereinafter collectively "TWRA") for reasons to compromise the pending Notice Of Violation (hereinafter collectively "NOV") issued to TWRA on November 9, 2007; to avoid costly litigation; and because both agencies want to cooperate to resolve this matter. As evidenced by the signatures below, the parties stipulate and agree, subject to the Reservation of Rights herein, as follows:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation.

II.

The Tennessee Wildlife Resources Agency (hereinafter the "TWRA") is an agency within the State of Tennessee.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act.

IV.

The TWRA is a “person” as defined at T.C.A. §69-3-103(20).

V.

The South Fork of the Obion River and the unnamed tributaries to the South Fork of the Obion River are referred to herein as “waters of the state” as defined in T.C.A. §69-3-103(33).

VI.

T.C.A. §69-3-108 requires a person to obtain a permit from TDEC prior to the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state.

FACTS

VII.

On October 29, 2007, staff of the division of Water Pollution Control contacted the TWRA to inquire about the construction activities occurring at the Hop-In Wildlife Refuge near the Black Swamp wetland area, located along SR-89, in Obion County (hereinafter the "site"). TWRA stated that water control structures including a berm, piping, a water control structure and flap gates were being installed in order to impound water at the site.

VIII.

On November 6, 2007, division staff conducted a site inspection and performed a stream determination on two unnamed tributaries to the South Fork Obion River, one paralleling Highway 89 in which a culvert had been installed and one crossing the Hop-In Area in which a water control structure had been installed. The staff determined that the watercourses were streams. Additionally, it was observed that more than 1 acre of land had been disturbed for construction activities without TNCGP coverage.

IX.

On November 9, 2007, the division issued an NOV to TWRA for the unauthorized alteration of waters of the state and the unauthorized disturbance of more than 1 acre of land for construction activities. The unauthorized alterations to waters of the state included the placement of a corrugated metal pipe (CMP) in the unnamed tributary to the South Fork of the Obion River along SR-89, the construction of a new

channel for the unnamed tributary to the South Fork of the Obion River running through the Hop-In Refuge, and the placement of a water control structure in the unnamed tributary running through the Refuge.

X.

On November 19, 2007, division personnel observed that the flap gate, which was first discovered in the unnamed tributary to the South Fork of the Obion River along SR-89 during the November 6, 2007, site visit, had been installed.

Additionally, on this date, TWRA notified the division, via email, that stabilization activities had been completed on November 15, 2007, and that all construction activities occurring at the site had ceased and the project had been completed.

CONCLUSIONS OF LAW

XI.

It is the position of TDEC that by physically altering waters of the state without authorization under an ARAP and by conducting construction activities without authorization under the TNCGP, TWRA has violated T.C.A. §§69-3-108(a) and (b), which states:

T.C.A. §69-3-108:

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
- (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into

a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;
- (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

ORDER ON CONSENT

XII.

The Commissioner hereby ORDERS and TWRA hereby CONSENTS to the provisions of the paragraphs below.

1. TWRA will propose a Supplemental Environmental Project (hereinafter “SEP”). The SEP proposed by TWRA shall be in line with TDEC’s SEP guidelines. The proposed SEP must be submitted, in writing, to the Commissioner within sixty (60) days of entry of this Order. The written proposal must include an estimate of the anticipated cost of the project(s). Before implementing any proposed SEP, the SEP must be approved, in writing, by the Commissioner. In the event that the proposed SEP is not

approved, the Commissioner may extend the time in which to submit an alternative SEP proposal. TWRA must provide documentation to TDEC of the actual costs expended on each SEP. The value of the SEP shall be at least FIFTEEN THOUSAND DOLLARS (\$15,000.00).

2. TWRA shall submit an application for an individual permit for its proposed structures in the unnamed tributaries in the Hop-In Area and for their operation to impound water in Black Swamp. If TWRA conducts any additional land disturbance activities at the site, TWRA will also submit a Notice of Intent to be covered by the General NPDES Permit for Discharge of Storm Water Associated with Construction Activities for the disturbance of more than one (1) acre of land. "Land disturbance activities" does not include agricultural activities exempted by T.C.A. §69-3-120(g) or maintenance of existing roads (see definition of "clearing" p. 34 of Construction Storm Water General Permit).
3. TDEC will carefully review the permit application, place the application on Public Notice to allow for public comment and hold a public hearing if requested.
4. TDEC will issue a determination granting or denying the permit application within six (6) months from the date the application is received unless the parties agree otherwise.
5. Should the decision be appealed by either TWRA or a third party, TDEC agrees to expedite the appeal and schedule a hearing on it within six (6) months of filing, subject to the schedules of any other parties and any

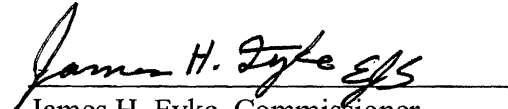
requirements of the Water Quality Control Board and the administrative judge. TDEC and TWRA agree that the decision of the Water Quality Control Board on any appeal will be binding on them.

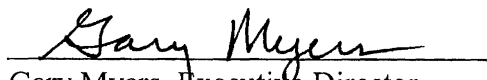
6. Pending the appeal there shall be no alteration to the hydrology of Black Swamp that is caused by the recent construction activities of TWRA. If there is such an alteration of the hydrology while the permit application and any appeal are pending, TWRA agrees to take the necessary action to reverse that alteration. The parties understand that the water levels of Black Swamp change frequently; this provision would not be triggered by such changes alone, but would be triggered if the recent construction impacts the rate or magnitude of those changes in water levels.
7. If there is an appeal and the Board should ultimately rule that TWRA is not entitled to a permit for the structures subject of this Order, TWRA agrees to remove all such structures.
8. TWRA shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.
9. The Commissioner does not expressly or implicitly waive his authority pursuant to any provision of the Tennessee Water Quality Act or Department Rules promulgated thereunder by signing this Consent Order.
10. TWRA does not admit or deny the factual allegations or the alleged violations of law contained in the November 9, 2007 NOV. In order to avoid the cost of protracted litigation and to voluntarily promote

greater environmental protection, TWRA voluntarily agrees to the terms in Section XII. items 1 – 9. TWRA reserves the right to contest the factual allegations and alleged violations contained in this Consent Order in any proceeding other than a proceeding brought by TDEC to enforce the terms of this Consent Order.

ORDERED, AGREED, AND CONSENTED to by the parties this

11th day of December, 2007.


James H. Pyke, Commissioner
Tennessee Department of Environment
& Conservation


Gary Myers, Executive Director
Tennessee Wildlife Resources Agency